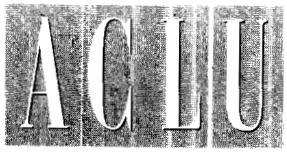
QA 28086



AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION OF
NORTHERN CALIFORNIA



**VIA FEDERAL EXPRESS**

October 23, 1997

Docket Clerk
U.S. DOT Dockets
Room PL-401
400 Seventh Street, S.W.
Washington, DC 20590-0001

Re: Docket No. FHWA-97-2759; 33 English Language Requirement, Qualifications of Drivers; 49 CFR Part 391

To the Federal Highway Administration:

I write on behalf of the American Civil Liberties Union Foundation of Northern California in response to the FHWA announcement regarding possible revisions to the requirement in 49 CFR 391.11(b)(2) of the Federal Motor Carrier Safety Regulations pertaining to English language qualifications of drivers of commercial motor vehicles.

In a letter dated March 14, 1997 to Mark Brenman of the DOT Office of Civil Rights, we explained why the current regulation has an unnecessary discriminatory impact upon national origin and ethnic minorities and was inconsistent with Title VI of the Civil Rights Act of 1964. We also explained why its vague and broad language invited subjective and discriminatory enforcement in violation of Due Process. A complete copy of that letter is enclosed herewith and incorporated by reference herein as part of our formal comment.

In addition to the comments contained in the attached March 14, 1997 letter, we have supplemental remarks. First, the discretionary and discriminatory enforcement invited by the current regulation has been further illustrated by recent citations issued by the state troopers in Pennsylvania. The ACLU affiliate in Pennsylvania has recently been informed about another case in which an individual licensed by the State of Pennsylvania to drive commercial vehicles was cited by a state trooper who judged the individual as not being sufficiently proficient in the English language under the state regulations



13 pg

1663 MISSION STREET • SUITE 460 • SAN FRANCISCO • CA 94103 • TELEPHONE: (415) 621-2493

which adopt 49 CFR 391.11(b)(2). It is our understanding that the driver, Mr. Ricardo Pilotos, speaks some English and has successfully communicated on previous occasions with other state troopers. He has not had any safety violations. Yet, he was cited pursuant to the regulation by a state trooper, who reportedly has cited four or five other Spanish speaking drivers as well. As in the New Jersey case discussed in our March 14, 1997 letter, there appears to be no standard criteria or validated methodology by which drivers' English ability are assessed. Enforcement is left totally to the discretion of the officer in the field.

Second, the regulation in question invites uneven and inconsistent enforcement among the states. As mentioned in our March 14, 1997 letter to Mr. Brenman, states with substantial language minority populations such as Arizona, California, Florida, New Jersey, New York, Texas, and Washington (as well as Pennsylvania) offer the commercial drivers license examination in both English and Spanish. On the other hand, officials in states such as Illinois and New Mexico have told us they administer the commercial license in English only because of their understanding of the requirements of the federal regulations. It is difficult to understand why the ability to read the English language text of the written examination (as opposed to knowing the substantive rules and being able to read road signs) is necessary to driving a commercial vehicle. The current regulation has lead to inconsistent and irrational policies.

For the reasons stated in our March 14, 1997 letter, we believe the regulation is inconsistent with Title VI of the 1964 Civil Rights Act and invites violations of Due Process and should be revised pursuant to our comments therein.

Sincerely,

Edward M. Chen
Staff Counsel

Encl.

AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION OF
NORTHERN CALIFORNIA

March 14, 1997

Marc Brenman
Department of Transportation
Office of Civil Rights
Room 10217
400 Seventh Street, N.W.
Washington, DC 20590

Re: Motor Carrier Safety Regulation 49 C.F.R. Section 391.11(b)(2)

Dear Mr. Brenman:

We understand that the Department of Transportation and the Federal Highway Administration are in the process of reevaluating various regulations, including Motor Carrier Safety Regulation 49 C.F.R. Section 391.11(b)(2). We write to submit an analysis and comment on this regulation which pertains to the qualifications of drivers of motor vehicles on behalf of motor carriers.

## I. Introduction

The A.C.L.U. is concerned that the Federal Motor Carrier Safety Regulation 49 C.F.R. Section 391.11(b)(2) has an unnecessary discriminatory impact upon on national origin and ethnic minorities and is inconsistent with Title VI of the Civil Rights Act of 1964, 42 U.S.C. Section 2000d. The regulation requires motor vehicle drivers, who are employed by motor carriers, to "read and speak the English language sufficiently to converse with the general public, to understand highway traffic signs and signals in the English language, to respond to official inquiries, and to make entries on reports and records." The demanding English fluency requirements in 49 C.F.R. Section 391.11(b)(2) disproportionately disqualifies national origin and ethnic minorities, many of whom have limited English proficiency; yet it is overbroad and not tailored to the government's interest in public safety. Further, the vague and broad language of 49 C.F.R. Section 391.11(b)(2) permits subjective and discriminatory enforcement of the regulations in violation of Due Process.

The A.C.L.U. recognizes that the Federal Highway Administration must promulgate regulations to protect the health and safety of travelers on our nation's highways. To this end, English fluency requirements more precisely tailored to the public's legitimate interests could be promulgated. For instance, a regulation requiring drivers to *understand* high way traffic signs and signals in the English language would be specific and reasonable. Requiring that drivers be able to communicate with law enforcement officers in the field on matters that are *common and routine* would also be reasonable. Finally, requiring that drivers be able to make entries on reports and records that are required by law, which cannot be made with the assistance of others before or after the driving assignment but must be made *during* the course of driving, may also constitute a legitimate requirement related to the act of driving a motor carrier vehicle.

However, 49 C.F.R. Section 391.11(b)(2), as it is currently codified, requires far more in the way of English proficiency. It requires, for instance, that drivers possess a level of English fluency sufficient to converse with the general public, a fluency requirement that is beyond the level necessary to safely operate a motor vehicle carrier. The regulation's broad and unjustifiable English fluency criteria will inevitably have a substantial, yet unnecessary, discriminatory impact upon national origin and ethnic minorities. To rectify this disparate and discriminatory impact, we suggest that the Federal Highway Administration amend 49 C.F.R. Section 391.11(b)(2) to require only the basic level of English fluency necessary to the *actual* task of driving a motor vehicle and include specific language to ensure that the regulation is fairly and objectively administered. We also suggest that the regulation make clear that state licensing examinations need not be given in only English and that states may offer tests in other languages (as many states currently do) so long as the examinee demonstrate the rudimentary English proficiency required by the federal regulation.

## II. **Title VI of the Civil Rights Act of 1964**

Title VI of the Civil Rights Act of 1964, as amended, provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving Federal Financial assistance." Title VI Section 601, 42 U.S.C. Section 2000d. Each federal department and agency empowered to extend federal financial assistance "to any program or activity, by way of grant, loan, or contract . . . is authorized and directed to effectuate the provisions of 42 U.S.C. Section 2000d," by implementing regulations. 42 U.S.C. Section 2000d-1.

The Department of Transportation regulations implementing Title VII, like similar Title VI regulations promulgated by other federal agencies, adopt a disparate impact definition of discrimination. 49 C.F.R. Section 21.5(b)(2). The regulations prohibit recipients of federal funds from "utiliz[ing] criteria or methods of administration which have the effect of subjecting persons to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, or national origin." *Id.* (emphasis added). These regulations have the force of law. In Guardians Ass'n v. Civil Service Comm., the United States Supreme Court upheld Title VI regulations adopting disparate impact discrimination standards, holding that Title VI vests enforcing agencies with the authority to proscribe discriminatory effects. Guardians, 463 U.S. 582, 584 n.2, 608 n.1 (Powell, concurring) (1983). *See also* Alexander v. Choate, 469 U.S. 287, 292-94 (1985) (favorably reviewing use of the disparate impact standard in Guardians).

Under Title VI, the three elements of a disparate impact claim have been "gleaned by reference to cases decided under Title VII." Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985); *see also* Larry P. v. Riles, 793 F.2d 969, 982-83 nn.9-10 (9th Cir. 1984); Campaign for Fiscal Equality, Inc. v. New York, 86 N.Y.2d 307 (New York Ct. App. 1995); 42 U.S.C. Section 2000e - 2000e17. A disparate impact is shown where "a facially neutral practice has a disproportionate adverse effect on a group protected by Title VI." Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1407 (11th Cir. 1993), *reh'g denied*, 7 F.3d 242 (11th Cir. 1993); *see also* Jeldness v. Pearce, 30 F.3d 1220, 1229 (9th Cir. 1994), Georgia State Conference, 775 F.2d at 1417. An agency may defend the practice or policy by proving that the disproportionate impact was justified by a showing akin to the "business necessity" test under Title VII. Larry P., 793 F.2d at 982; *see also* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971); Jeldness, 30 F.3d at 1229; Georgia State Conference, 775 F.2d at 1417. However, this claim of business necessity may be rebutted by the complainant by demonstrating the existence of other alternatives that have less discriminatory impact on groups protected by Title VI. Elston, 997 F.2d at 1407; Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1119 (8th Cir. 1993) (Title VII disparate impact claim); Colby v. J.C. Penny Company, Inc., 926 F.2d 645, 649 (7th Cir. 1991) (Title VII).

**III. 49 C.F.R. Section 391.11(b)(2), as written, conflicts with Title VI of the Civil Rights Act of 1964.**

The criteria of Motor Carrier Safety Regulation 49 C.F.R. Section 391.11(b)(2) broadly and vaguely define the qualifications of a vehicle driver on behalf of a motor carrier, require an unnecessarily high level of fluency in the English language, and have an unjustifiable discriminatory impact upon national origin and ethnic minorities. The criteria, therefore, conflict with the Department of Transportation's own Title VI regulations, subjecting state agencies covered by these two sets of regulations to conflicting and irreconcilable directives.

The Motor Carrier regulation has the discriminatory *effect* of disproportionately excluding national origin and ethnic minorities from becoming licensed vehicle drivers for motor carriers. The burden of the regulation falls primarily on national origin minorities, a substantial proportion of whom possess limited English language skills.

The profound disparate impact can hardly be disputed. The inextricable link between language and ancestry/national origin status is undeniable and obvious. An individual's primary language, as much as any other characteristic such as surname, is highly indicative of an individual's national origin, ancestry and ethnicity.[1] Accordingly, many courts, including the United States Supreme Court, have recognized this linkage between one's language and his or her national origin and ethnic minority status. In Lau v. Nichols, 414 U.S. 563 (1974), the Court held that denial of educational benefits to non-English speaking students violated Title VI's ban on national origin discrimination. *See also*, Hernandez v. New York, 500 U.S. 352, 371 (1991) (suggesting that language proficiency may be considered as a surrogate for race for certain ethnic groups under equal protection analysis); Castaneda v. Partida, 430 U.S. 482, 486 n.5 (1977) (taking as synonymous language and ethnic surname/ancestry characteristics); United States v. Alcantar, 897 F.2d 436, 440 (9th Cir. 1990) (noting that fluency in Spanish language is closely tied to Hispanic national origin); Fragante v. City and County of Honolulu, 888 F.2d 591, 596 (9th. Cir. 1989) (finding language ability, accent and national origin status "inextricably intertwined" in many cases), *cert. denied*, 494 U.S. 1081 (1990); Gutierrez v. Municipal Court, 838 F.2d 1031, 1039 (9th Cir. 1988) (finding that foreign language and accent characteristics are connected to national origin identification), *vacated as moot*, 490 U.S. 1016 (1989). Cf. Hernandez v. Texas, 347 U.S. 475, 480 n.12 (1954) (equating ethnic surnames with ethnic ancestry).

---

[1] *See* Fishman, "Language and Ethnicity," Language, Ethnicity & Intergroup Relations, 23, 25-26 (Giles, ed., 1977) (language is a prime symbol of ethnicity, a central aspect of the ethnic identity of natural origin minorities).

In interpreting Title VII's ban on national origin discrimination, the Equal Employment Opportunity Commission (EEOC) recognizes national origin discrimination as, "including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group," 29 C.F.R. Section 1606.1, and that the "primary language of an individual is often an essential national origin characteristic." 29 C.F.R. Section 1606.7(a). Accordingly, the EEOC guidelines specify that "[f]luency-in-English requirements, such as denying employment opportunities because of an individual's foreign accent, or inability to communicate well in English," may constitute unlawful discrimination on the basis of national origin. 29 C.F.R. Section 1606.6(b)(1). As noted above, interpretation of Title VII informs Title VI disparate impact analysis.

The regulatory and jurisprudential recognition of the close linkage between language and national origin is well grounded in demographic evidence. According to the 1990 Census of Population for the United States, the number of people who are age eligible[2] for employment as a motor vehicle driver is 153,908,000.[3] Of this total, 9,793,186 or 6.4%[4] do not speak English "very well.[5] It is these individuals, who are disproportionately ethnic and national origin minorities, who will be impacted by the English fluency requirements of 49 C.F.R. 391.11(b)(2). Within this group of 9,793,186 who do not speak English "very well," 20% are racially classified as Asian or Pacific Islander and 28% are racially classified as non-White (primarily people of Hispanic origin); 46% are racially classified as White.[6] In contrast, only 3.1% of the *general* age eligible population is Asian/Pacific Islander and 8.6% are of Hispanic origin; 80% are white.[7]

---

[2] The range is 18 years old (49 C.F.R. 391.11(b)(1)) - 64 years old. (64 years old is used as the upper age limit for purposes of this analysis since it demarks a common age for retirement).

[3] Statistical Abstract of the United States 1996, table No. 57.

[4] 1990 Census of the Population, Social and Economic Characteristics, Table 40, 40.

[5] 1990 Census of Population, Social and Economic Characteristics, table 15. This number represents a subset of people over the age of 5 who affirmatively answered that they sometimes or always spoke a language other than English at home. If a person over the age of 5 reported that they spoke a language other than English at home, they were subsequently asked to indicate their ability to speak English based on one of the following categories, "very well," "well," "not well," or "not at all." *Id.* B-23-25. We assume that those who **only** speak English at home (and thus were not asked this question) speak English very well.

[6] *Id.* Table 40, 40

[7] *Id.* Table 40, 40

The disproportionate impact of the English fluency requirement is further illustrated by the fact that 40% of age eligible individuals[8] who are racially classified as Asian or Pacific Islander, 43% of Hispanics and 9% American Indian, Eskimo or Aleut individuals do *not* speak English "very well." In contrast, only 3.6% of age eligible individuals who are racially classified as White do not speak English "very well". Ethnic minorities, especially Asian and Pacific Islanders and people of Hispanic origin, therefore, are disproportionately impacted by English proficiency requirements like those contained in 49 C.F.R. 391.11(b)(2).

Finally, English fluency requirements have a disparate impact on foreign-born individuals as compared to native-born individuals. Between the ages of 18-64, there are 14,979,25[9] foreign-born individuals in the United States; there are 138,928,742[10] native-born individuals in the same age range. Of the native-born individuals, only 1.8%,[11] do not speak English "very well."[12] However, of the foreign-born individuals, 48%[13] do not speak English "very well." The impact of English fluency requirements falls more heavily on national origin, foreign-born, individuals than on native-born individuals.

The Federal Motor Carrier Safety Regulation 49 C.F.R. 391.11(b)(2) English language proficiency requirements indisputably have a "disproportionate adverse effect on a group protected by Title VI," Elston, 997 F.3d at 1407, and can only be sustained if they are justified as a business or institutional necessity.

---

8 18 - 64 years old.

9 1990 Census of Population, The Foreign-Born Population in the United States, Table 1,1.

10 1990 Census of Population, Social and Economic Characteristics, Table 15, 15.

11 1990 Census of Population, Ancestry of the Population in the United States, Table 3, 205.

12 *See supra* note 5.

13 *Supra* note 9.

## IV. The Regulation Cannot be Sustained by a Business Necessity

Under Title VII, a discriminatory and disparate impact cannot be sustained unless the discriminatory criteria or practice can be justified "as a business necessity," that has "a demonstrable relationship to successful performance of the jobs for which it was used." Griggs, 401 U.S. at 431. To meet this test, the discriminatory employment practice or criteria must be, "necessary to safe and efficient job performance." Dothard v. Rawlinson, 433 U.S. 321, 331-32 n.14 (1977). The business necessity standard has been incorporated into Title VI to require a showing of institutional necessity -- usually business or educational necessity -- to sustain a discriminatory criteria or policy. *See, e.g.*, Georgia State Conference, 775 F.2d at 1417-18 (defining "educational necessity" as requiring a manifest demonstrable relationship to class room education); *see also* Board of Education v. Harris, 444 U.S. 130, 151 (1979) (requiring educational necessity to rebut disparate impact showing in Emergency School Aid Act case); Jeldness, 30 F.3d at 1229 (requiring business necessity under Title VI); Elston, 997 F.2d. at 1412 (requiring a showing of institutional necessity under Title VI); Larry P., 793 F.2d. at 982-83 & nn. 9-10 (reaffirming a defendants' burden to show employment or educational necessity in a Title VI action); Groves v. Alabama State Board of Educ., 776 F. Supp. 1518, 1529-30 (M.D. Ala. 1991) (requiring business or educational justification in a Title VI action).

To meet the necessity standard in this case, the English fluency requirements of 49 C.F.R. 391.11(b)(2) must be *necessary* to achieve a, "legitimate, important and integral" goal of the institutional mission of the Department of Transportation and Federal Highway Administration. Elston, 997 F.2d at 1413. We acknowledge that the goal of 49 C.F.R. 391.11(b)(2), seeking the safe and efficient operation of motor vehicles by qualified drivers, is legitimate and important. However, the criteria of the regulation are overbroad, requiring a level of English not necessary to the *actual* task of "safe and efficient" operation of a motor carrier vehicle. Dothard, 433 U.S. at 331-32 n.14.

There is no business necessity which would require, for instance, conversational English fluency with the general public. Requiring anything more than a basic level of proficiency in English necessary to respond to common and routine law inquiries by enforcement officers on the road and to understand traffic signs and signals in English, does not further a "legitimate, important and integral" goal of the FHA. The lack of a business or institutional necessity is underscored by the fact that states with substantial immigrant population such as Arizona, California, Florida, New Jersey, New York, Texas, and Washington offer the written portion of the commercial drivers license examination in *both* English and Spanish. These states have made

the judgment that a high degree of English fluency is not necessary to safely perform such jobs.[14]

The unnecessary discriminatory impact and of 49 C.F.R. Section 391.11(b)(2) is illustrated by a case in New Jersey. New Jersey adopted and incorporated the Federal Motor Carrier Safety Regulations into state law under the New Jersey Motor Vehicles and Traffic Code, Section 39:5B-32 and implementing regulations 26 N.J.R. 2143. Subsequently, a New Jersey state trooper cited a commercially licensed truck driver for not "speaking" English. For the infraction and citation, the state trooper relied *solely* on the New Jersey code which incorporated 49 C.F.R. 391.11(b)(2).

The cited driver, Felix Zamora, is a legal permanent resident who immigrated from Ecuador, and who had been driving a commercial truck in this country for fourteen years. Mr. Zamora *does* in fact speak some English, although accented and with limited proficiency. Nonetheless, he has safely and effectively operated a commercial truck, with an unblemished driving record, for more than fourteen years. Mr. Zamora obtained his commercial license in New York where the written test is offered in Spanish or in English. Even though Mr. Zamora was licensed in New York, the state of New Jersey *also* offers the written portion of the commercial drivers license test in Spanish. The charges were ultimately dropped.[15] This case demonstrates how the federal regulation can discriminatorily and arbitrarily jeopardize the livelihood of national origin minorities who are perfectly qualified to drive a motor vehicle.

[14] Moreover, in a 1995 survey by the American Association of Motor Vehicle Administrators, 34 of 48 reporting states offer their general driver license examination in language other than English. To our knowledge, there are no studies which demonstrate any correlation between driver English proficiency and traffic safety.

[15] "Trucker ticketed for bad English gets off the hook, so to speak," Kathy Barrett Carter, The Star-Ledger, Thursday, February 8, 1996; "Driver cleared of charge he spoke English poorly," Melanie Burney, Bergen Record, February 8, 1996, Page A3; "Lack of Fluency Not Illegal," New York Times, February 8, 1996.

## V. The Federal Highway Administration Should Redraft the "Qualifications of a Driver," Regulation, 49 C.F.R. Section 391.11(b)(2), with Alternative, Less Discriminatory Criteria.

Even if justified by business necessity, the use of a discriminatory practice cannot be sustained under Title VI if there are comparably effective alternative practices or criteria which would result in less discriminatory impact. Elston, 997 F.2d at 1407; *see also* Colby v. J.C. Penny Company, Inc., 926 F.2d at 649 (Title VII disparate impact claim); Fitzpatrick v. City of Atlanta, 2 F.3d at 1119 (Title VII). In this case, less discriminatory and narrowly drafted alternative criteria that will adequately protect the health and safety of the public, can be achieved by modifying 49 C.F.R. Section 391.11(b)(2). The criteria requiring drivers to communicate in English sufficiently to respond to official inquiries can be narrowed to specifically require that drivers be able to respond to law enforcement officers in the field making inquiries that are *common and routine* such as questions about the driver's identity, destination, and nature of the cargo. The criteria requiring drivers to make entries on reports and records should be modified to include only those entries on reports and records that are required by law which cannot be made with the assistance of others before of after the driving assignment, but which must be made only by the driver *during* the trip. Finally, the criteria which requires conversational fluency with the general public should be removed altogether from 49 C.F.R. Section 391.11(b)(2) since it is *not* required to safely and efficiently operate a motor vehicle on behalf of a motor carrier.

Importantly, the redrafted regulation should explicitly state that licensing agencies are *not* required to conduct the examination in English only and that use of foreign language examinations are consistent with this regulation so long as the driver demonstrates the rudimentary level of English required by the regulation.[16]

These modifications would serve the interests of the Federal Highway Administration *and* reduce the unnecessary discriminatory impact on individuals of national origin and ethnic minorities. They would harmonize the Motor Carrier regulation with Title VI and D.O.T.'s regulations thereunder.

---

[16] In a brief survey of several states we learned that although most of the states with substantial immigrant population offer commercial drivers license examination in languages other than English, Illinois and New Mexico test in English only. Officials explained to us that it was their belief that federal law required testing in English.

## VI. The Vague Criteria of 49 C.F.R. Section 391.11(b)(2) Invites Arbitrary Enforcement in Violation of Due Process of the Law.

We believe that Motor Carrier Safety Regulation 49 C.F.R. Section 391.11(b)(2) is flawed for an additional reason. The criteria are unconstitutionally vague and invites arbitrary enforcement. They do not provide a workable standard for an enforcement agency or official to determine whether the level of a person's fluency in English "qualifies" under the criteria. Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971). For example, the regulation does not specify what is required by way of conversational fluency. Additionally, 49 C.F.R. Section 391.11(b)(2) does not indicate the degree or depth of response required in English to "official inquiries," nor does the regulation specify the scope or nature of the "official" inquiries to which the driver is expected to respond. The regulation does not inform the public officials responsible for enforcing the regulation about what kinds of entries on what types of records and reports the driver must be able to complete. Finally, the regulation does not prohibit what New Jersey has done: leave its enforcement to officers in the field whose assessment of a driver's English fluency is subjective and untrained.

The lack of standards governing the meaning and enforcement of 49 C.F.R. Section 391.11(b)(2) create the danger that the regulation will be enforced arbitrarily and violate the due process requirement that reasonable clear guidance be given to law enforcement officials. Kolender v. Lawson, 461 U.S. 352, 358 (1983). A standardless and unqualified regulation, such as 49 C.F.R. Section 391.11(b)(2), vests complete and unguided discretion in both the agency and individual officials in deciding who is "qualified" to be a vehicle driver on behalf of a motor carrier. As shown by the case of Mr. Zamora in New Jersey, the vague criteria of 49 C.F.R. Section 391.11(b)(2) furnish "a convenient tool for harsh and discriminatory enforcement . . . against particular groups. . . and confers on police a virtually unrestrained power to arrest and charge persons with a violation." Kolender, 461 U.S. at 360 (quotations omitted).

The Federal Highway Administration should redraft 49 C.F.R. Section 391.11(b)(2) to remove the unnecessarily high level of English proficiency required and provide specific standards and procedures to limit the discretion of public agencies who enforce the regulation to prevent the future "arbitrary and discriminatory enforcement of the law." Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972). One way to decrease the potential for discriminatory and arbitrary enforcement is to require that the federal criteria be enforced not by officers in the field, but through standardized and validated procedures at the licensing stage.

## VII. **Conclusion**

The A.C.L.U. encourages the Federal Highway Administration to redraft 49 C.F.R. 391.11(b)(2) with the narrow and specific language suggested. These changes would serve the interests of the Department of Transportation and the Federal Highway Administration in promulgating effective safety regulations, while decreasing the unnecessary discriminatory impact that the current regulation has on national origin and ethnic minority populations. It would harmonize regulation with the Department's Title VI regulations. Finally, it would minimize arbitrary enforcement.

Sincerely,

/s/

Edward M. Chen
Staff Counsel

EMC:ew

emc\letters\dot0314.ltr